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# In the Supreme Court of the United States

October Term, 1984

PYRAMID LAKE PAIUTE TRIBE OF INDIANS,

*Petitioner,*

v.

CARSON-TRUCKEE WATER CONSERVANCY, DISTRICT, *et al.*,

*Respondents.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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## QUESTIONS PRESENTED

Should a decision of the Ninth Circuit Court of Appeals be allowed to stand which:

(1) Undermines the intent of Congress of encouraging private enforcement of federal environmental legislation by applying, in conflict with this Court's decision in *Ruckelshaus v. Sierra Club*, — U.S. —, 103 S.Ct. 3274 (1983), a "substantial, exceptional contribution" test as a basis for denying an award of attorney's fees to a prevailing party in litigation under the Endangered Species Act of 1973, 16 U.S.C. § 1531 *et seq.* (ESA)?

(2) Imposes a more restrictive standard on awards of attorney's fees to parties prevailing in litigation under the ESA and other federal environmental laws than that imposed for fee awards under federal civil rights laws when in fact Congress intended and this Court has held that a broader standard apply?

## PARTIES TO THE PROCEEDING

Petitioner is the Pyramid Lake Paiute Tribe of Indians. Respondents are the Carson-Truckee Water Conservancy District, Sierra Pacific Power Company and the State of Nevada. The Secretary of the Interior, while designated Defendant-Appellee in the appeal to the Ninth Circuit Court of Appeals, did not actively participate in the appeal. Accordingly, Petitioner believes the Secretary has no interest in the outcome of the petition.

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v.

CARSON-TRUCKEE WATER CONSERVANCY, DISTRICT, *et al.*,

*Respondents.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner Pyramid Lake Paiute Tribe of Indians respectfully prays that this Court issue a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit in *Carson-Truckee*

*Water Conservancy District v. Secretary of the Interior*, No. 83-2542, entered on November 28, 1984.

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## OPINIONS BELOW

The opinion of the United States District Court for the District of Nevada is reported as *Carson-Truckee Water Conservancy District v. Watt*, 575 F.Supp. 467 (D. Nev. 1983), and is attached to this petition as Appendix A. The opinion of the Ninth Circuit Court of Appeals is reported as *Carson-Truckee Water Conservancy District v. Secretary of the Interior*, 748 F.2d 523 (9th Cir. 1984), and is attached to this petition as Appendix B.

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## JURISDICTION

The opinion of the Ninth Circuit Court of Appeals was dated and filed on November 28, 1984. The judgment sought to be reviewed was entered on the same date. Jurisdiction to review the Court of Appeals' judgment in this civil case by writ of certiorari is conferred upon this Court by 28 U.S.C. § 1254(1). This petition for writ of certiorari is filed within the 90-day period prescribed by 28 U.S.C. § 2101(c), as computed in accordance with Rule 20 and 29(1) of the Rules of the Supreme Court of the United States.

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## STATUTE TO BE CONSTRUED

The decision below construed the attorney's fee provision of the Endangered Species Act of 1973, 16 U.S.C. § 1540(g)(4), which provides:

> (4) The Court, in issuing any final order brought pursuant to paragraph (1) of this subsection, may award costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court determines such an award is appropriate.

## STATEMENT OF THE CASE

The Carson-Truckee Water Conservancy District, Sierra Pacific Power Company and the State of Nevada (hereinafter "Carson-Truckee") brought suit in the United States District Court for the District of Nevada in 1976 to compel the Secretary of the Interior to sell water from Stampede Reservoir for municipal and irrigation purposes. *Carson-Truckee Water Conservancy District v. Watt*, 537 F.Supp. 106 (D. Nev. 1982) (*CTWCD I*). Stampede Dam and Reservoir are Bureau of Reclamation projects on the Truckee River in Nevada constructed under the Washoe Reclamation Project Act of 1956. Pub. L. No. 84-858, 70 Stat. 775, 43 U.S.C. §§ 614-614d. The Truckee River below Stampede empties into Pyramid Lake which is entirely within the exterior boundaries of the Pyramid Lake Paiute Indian Reservation.

The Tribe filed a motion to intervene as a matter of right in 1976.[1] The Tribe alleged, first, that as beneficial

[1]Rule 24(a), Federal Rules of Civil Procedure.

or equitable owner of rights to the use of waters of the Truckee River and pursuant to its reserved "Winters Doctrine" rights[2] it had a substantial interest in the subject matter of the litigation. Second, the Tribe asserted that based on a history of litigation on related matters it did not believe its interests were fully or adequately represented by the Secretary.[3] Intervention as a matter of right was granted the Tribe in 1977.

One of the primary defenses raised by the Tribe was that the Secretary was precluded from selling water to Carson-Truckee by the Endangered Species Act. The Truckee River contains two species of fish—the cui-ui and the Lahonton cutthroat trout—which are classified as endangered or threatened under the ESA.[4] For several years the Tribe has sought to protect the fish population of the Truckee River to establish a commercial fishery in fulfillment of its rights recognized by treaty with the United States.

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[2]Pyramid Lake Paiute Tribe of Indians v. Morton, 354 F. Supp. 252, 264-5 (D.D.C. 1973).

[3]See Pyramid Lake Paiute Tribe of Indians, *supra,* 354 F. Supp. 252; and at 360 F.Supp. 669 (D.D.C. 1973); United States v. Alpine Land and Reservoir Co., 431 F.2d 763 (9th Cir. 1970), *cert. denied sub nom.,* Pyramid Lake Paiute Tribe of Indians v. United States, 401 U.S. 909 (1971). The conflict of interest inherent in the Department of the Interior's responsibilities through the Bureaus of Reclamation and Indian Affairs in the context of Indian water rights has been recognized and articulated by this Court in a case involving essentially the same litigants as here. *See* Nevada v. United States 463 U.S. 110 (1983).

[4]The Secretary of the Interior declared the cui-ui an endangered species in 1967, 32 *Fed. Reg.* 4001; and the Lahonton cutthroat trout to be "threatened with extinction" in 1975, 40 *Fed. Reg.* 29863.

Neither Carson-Truckee nor the Secretary disputed the priority of the government's obligations under the ESA to protect these threatened and endangered species of fish. The dispute focused instead on whether the ESA required the Secretary to operate Stampede Reservoir under a "jeopardy" or a "conservation" standard. In other words, the legal question was whether the Secretary's obligations were more accurately defined by § 7(a)(1) or § 7(a)(2) of the ESA. 16 U.S.C. §§ 1536(a)(1), (a)(2). *Carson-Truckee Water Conservancy District v. Watt,* 549 F.Supp. 704, 708-9 (D. Nev. 1982) (*CTWCD II*).

Under the former standard, advocated by Carson-Truckee, the Secretary need only supply that amount of water necessary to prevent extinction of the species. *Id.* at 708. Under the "conservation" standard, espoused by the Secretary and the Tribe, the Secretary's obligation was to "replenish the species so that they are no longer endangered or threatened with extinction." *Id.* at 708-9.

On the merits, the district court held that the ESA required the Secretary to operate Stampede giving priority to the fishery over all other puurposes until the cui-ui and Lahonton cutthroat trout were removed from the protected class as endangered and threatened species. *CTWDC II,* 549 F.Supp. at 706-08. Thus the court adopted the plan for operating Stampede under a conservation standard, rejecting Carson-Truckee's jeopardy standard. *Id.*[5]

The Tribe's claim that its interests were not adequately represented and protected by the Secretary was

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[5]The court noted that Carson-Truckee's proposal "does not meet their own standards because it would jeopardize the existence of the cui-ui and hasten their extinction." *Id.* at 711.

borne out several times during and following the litigation. While in trial, the Interior Department published in the *Federal Register* a notice of intent to sell water from Stampede Reservoir for municipal and irrigation purposes. *See* 46 *Fed. Reg.* 26705 (May 14, 1981). This notice completely contradicted the Secretary's position on the merits that his obligations both as trustee to the Tribe and under the ESA precluded the sale of any water for M & I purposes. *Id.* at 708.

The Secretary also filed a motion to amend the final judgment on the merits on November 5, 1982, to allow the Secretary greater discretion to operate Stampede than the district court had ordered. What the Secretary sought in effect was to amend the judgment to allow operation of Stampede under a § 7(a)(2) jeopardy standard, the standard espoused by Carson-Truckee and rejected by the court. The Tribe opposed the motion on the ground that the jeopardy plan had already been found by the court to hasten the extinction of the protected species of fish, arguing that the motion was nothing more than a cleverly disguised attempt to subvert the litigation. The district court ultimately denied the motion on December 22, 1982.

Finally, as a reflection of the continuing intransigence of the Interior Department, following the district court's decision the Interior Associate Solicitor for Conservation and Wildlife issued a memorandum to the Director of the U.S. Fish and Wildlife Service on September 7, 1983, recommending a national policy of "nonacquiescence" to the decision and order, stating that it is "not precedent setting and should be applied only to the Stampede Reservoir case." *See* Interior Department memorandum attached hereto as Appendix C, App. 18.

With respect to the substantive legal issue decided by the district court the memorandum concluded:

> In short, the district court in the *Carson* case should have upheld the discretionary authority of the Bureau of Reclamation to allocate Stampede Reservoir waters for endangered species conservation purposes and left it at that. As a matter of law, no one conservation regime should be considered favored or mandated as opposed to another. The attempt of the district court to mandate a particular program represents an unwarranted limitation of the discretionary conservation authorities granted to federal agencies. A clarification of these matters should thus be sought on appeal.

Appendix C, App. 28-9.

These issues were raised on appeal, but with no success. The Ninth Circuit Court of Appeals affirmed the case on the merits on all grounds. *Carson-Truckee Water Conservancy District v. Clark,* 741 F.2d 257 (9th Cir. 1984) *(CTWCD IV).*

Moreover, the Tribe was actively involved in the case since the beginning. Much of the government's discovery work was in fact initiated and carried out by the Tribe. The Tribe prepared all the interrogaties and served as lead counsel in all the depositions of plaintiffs' witnesses, as well as preparing and filing all pretrial procedural and discovery-related motions. The Tribe played a very active role in the trial of the case not only in the presentation of witnesses but in the cross-examination of adverse witnesses. Finally, the Tribe took the lead in the submission of briefs and did the majority of work on behalf of defendants.

Following the district court's decision on the merits, the Tribe moved for costs, expert witness fees and attor-

ney's fees. The court first granted the motion yet limited the recovery of costs and fees to work related to the issues under the ESA. Later the court became concerned about whether an award of attorney's fees was appropriate in this instance under the citizen suit provision of the ESA, and denied all requested fees outright. *Carson-Truckee Water Conservancy District v. Watt*, 575 F.Supp. 467, 470 (D. Nev. 1983) (*CTWCD III*).

The Tribe appealed the denial of fees, arguing that this Court's decision in *Ruckelshaus* establishes that a prevailing party on the merits is entitled to an award of fees absent exceptional or unusual circumstances. Moreover, the Tribe alleged that the district court erred by applying a test which the Court of Appeals for the District of Columbia had articulated in the context of *non-prevailing* or losing parties applying for fee awards under the Clean Air Act, 42 U.S.C. §§ 7401 *et seq.*[6] Under that standard a losing party would be entitled to an award of fees only if its contribution to the enforcement and implementation of a federal environmental statute were substantial and exceptional. Because it prevailed on the merits the Tribe asserted that standard should not apply.

The Ninth Circuit rejected the Tribe's contention that the substantial, exceptional contribution standard applied only to losing parties and rejected the Tribe's entitlement to attorney's fees as a prevailing party under the *Ruckelshaus* decision. *Carson-Truckee Water Conservancy District v. Secretary*, 748 F.2d 523 (9th Cir. 1984) (*CTWCD V*).

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[6]Alabama Power Company v. Gorsuch, 672 F.2d 1 (D.C. Cir. 1982); Sierra Club v. Gorsuch, 672 F.2d 33 (D.C. Cir. 1982).

## REASONS FOR GRANTING THE WRIT

### I. The Decision Of The Ninth Circuit That A Prevailing Party Must Nonetheless Prove Its Substantial, Exceptional Contribution To The Enforcement Of The Endangered Species Act Before Recovering Attorney's Fees Under That Act Raises Important Questions Of Federal Law And Frustrates The Congressional Intent Of Encouraging Private Enforcement Of Federal Environmental Legislation.

Under the attorney's fees provision of the ESA a court has the discretion to award fees to any party when such an award is deemed appropriate. The attorney's fees provision of the ESA literally provides that:

> [t]he Court, in issuing any final order in any suit brought pursuant to paragraph (1) of this subsection, may award costs of litigation (including reasonable attorney and expert witness fees) to *any party, whenever the court determines such an award is appropriate.* (Emphasis added.)

16 U.S.C. § 1540(g)(4).

This standard for awarding attorney's fees has been widely used by Congress in federal environmental legislation adopted over the past one and one-half decades. Seventeen federal environmental statutes—including § 1540 (g)(4) of the ESA—contain identical fee provisions, most notably the citizen suit provisions of the Clean Air and Water Acts.[7]

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[7]Clean Air Act, 42 U.S.C. § 7607(f); Clean Water Act, 33 U.S.C. § 1365(d). The remaining fourteen identical statutory fee provisions include: Toxic Substances Control Act, 15 U.S.C. § 2618(d); Surface Mining Control and Reclamation Act, 30

(Continued on next page)

Congress' adoption and use of the "any party . . . whenever appropriate" standard in the fee provisions of these federal environmental laws represented a significant departure from and expansion of the circumstances under which fees awards would be made. As compared to awards in other contexts, "it seems plain that Congress intended to give the Courts greater latitude" in making fee awards. *Environmental Defense Fund v. Environmental Protection Agency*, 672 F.2d 42, 48 (D.C. Cir. 1982).[8] Recently, this Court in *Ruckelshaus v. Sierra Club*, — U.S. —, 103 S.Ct. 3274 (1983), interpreted the fees provision of the Clean Air Act *and* the sixteen other identical fees provision as an expansion of fee awards over other contexts. *Ruckelshaus v. Sierra Club, supra*, 103 S.Ct. at 3275-6, n.1; *see* also 103 S.Ct. at 3279.

Through the enactment of comprehensive federal environmental legislation during the 1970's Congress expressly recognized the inherent value to society at large of the protection and enhancement of a clean environment. In the context of the ESA, Congress specifically noted the importance of all species of flora and fauna to the

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U.S.C. § 1270(d); Deep Seabed Hard Mineral Resources Act, 30 U.S.C. § 1427(c); Marine Protection, Research and Sanctuaries Act, 33 U.S.C. § 1415(g) (4); Deepwater Port Act, 33 U.S.C. § 1515(d); Safe Drinking Water Act, 42 U.S.C. § 300j-8(d); Noise Control Act, 42 U.S.C. § 4911(d); Energy Policy and Conservation Act, 42 U.S.C. § 6305(d); Powerplant and Industrial Fuel Use Act, 42 U.S.C. § 8435(d); Ocean Thermal Energy Conversion Act, 42 U.S.C. § 9124(d); and Outer Continental Shelf Lands Act, 43 U.S.C. § 1349(a) (5).

[8]Comparing awards under the fees provision of the Toxic Substances Control Act, 15 U.S.C. § 2618(d), the Freedom of Information Act, 5 U.S.C. § 552(a) (4) (E) and 28 U.S.C. § 2412(b).

future of mankind, and of taking measures necessary to protect and preserve these species and their habitats. 16 U.S.C. § 1531. This Court has reviewed the legislative history of the ESA and concluded that Congress found the value of endangered species to be "incalculable." *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 187 (1978).

Yet Congress knew that, because of the complexity of issues related to the protection of the environment and the enormity of the task, enforcement and implementation of these laws could not be met by federal agencies alone.

> [T]he purposes of the authority to award fees are not only to discourage frivolous litigation, *but also to encourage litigation which will assure proper implementation and administration of the act or otherwise serve the public interest.* (Emphasis added.)

H.R. Rep. No. 294, 95th Cong., 1st Sess. 337 (1977).[9]

> The purpose of an award of costs and fees is not mainly punitive. It is to allocate the costs of litigation equitably, to encourage the achievement of statutory goals. When the government is attempting to carry out a program of such vast and unchartered dimensions, there are roles for both the official agency and a private watchdog.

*Natural Resources Defense Council v. Environmental Protection Agency*, 484 F.2d 1331, 1338 (1st Cir. 1973) (interpreting the fees provision of the Clean Air Act).

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[9]Because of Congress' use of identical language in the fees provisions of these federal environmental statutes one can legitimately gain an understanding of congressional intent with respect to one act by reference to the legislative history of another. For example, the legislative history of the ESA indicates that its "language is parallel to that contained in the recent Marine Protection, Research and Sanctuaries Act of 1972, and is to be interpreted in that same fashion." H.R. Rep. No. 412, 93rd Cong., 1st Sess. 19 (1973), *quoted in* Village of Kaktovik v. Watt, 689 F.2d 222, 224, n.14 (D.C. Cir. 1982).

Indeed, the specific language of the citizen suit provision of the ESA provides for actions "to enjoin any person, including the United States and any other governmental instrumentality or agency" from violations of the Act. 16 U.S.C. §1540(g)(1). Congress anticipated that at times private enforcement of the ESA would be necessary against other private parties and even the federal government and its agencies and instrumentalities. The liberal fees provision of the ESA thus must be interpreted within that context.

The present case represents the classic type of private enforcement intended and encouraged by Congress. Although the Tribe intervened in the lawsuit as a defendant, its interests were consistent with and in fact prevented further extinction of the threatened and endangered fish populations in the Truckee River.[10] And while at first blush it may appear that the Tribe's intervention was unnecessary and duplicative because the federal government also advocated a conservation standard under the ESA, such was clearly not the case. As discussed earlier, both advocated the adoption of a conservation standard under the ESA. Yet in practical terms what the Secretary sought under that standard was significantly different from what the Tribe sought and would have resulted in a much different management scheme to the detriment of the fishery. The Secretary's plan—different from the

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[10]Congress intended by using the phrase "any party" to encourage the enforcement of federal environmental laws, regardless of whether the party seeking its enforcement was a defendant or an intervenor or otherwise. *See* remarks of Senator Tunney, *Legislative History of the Toxic Substances Control Act* at 136, 727-28 (1976).

Tribe's — was ultimately rejected by the district court. *See* discussion, *supra*.

The Tribe's active involvement throughout the litigation ultimately resulted in the type of private enforcement and implementation of the ESA anticipated by Congress, and should be the basis for recovery of a fee award.

By denying the Tribe attorney's fees, the Ninth Circuit's decision will in the future have a chilling effect upon the private enforcement of the ESA and the sixteen other environmental laws with identical fees provisions. Congress clearly did not intend to foist upon prevailing or partially prevailing parties in environmental lawsuits the added burden of demonstrating the substantial nature of their contribution, in a separate proceeding or otherwise, after litigating the merits of a case. In all but the most exceptional of circumstances that contribution would, by definition, be established by virtue of a party's prevailing status.

## II. The Decision Of The Ninth Circuit Denying The Tribe Attorney's Fees Conflicts With This Court's Decision In Ruckelshaus v. Sierra Club And With Decisions Of Other Circuit Courts of Appeals.

### A. The Ninth Circuit's Decision Conflicts With This Court's Decision In Ruckelshaus v. Sierra Club By Requiring A Prevailing Party To Make A Showing Of Its Substantial Contribution Before Recovering Attorney's Fees.

In its decision the Ninth Circuit held that the Tribe, a prevailing party by standards articulated in that Circuit[11]

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[11]Lummi Indian Tribe v. Oltman, 720 F.2d 1124, 1125 (9th Cir. 1983).

and by this Court,[12] was nonetheless not entitled to an award of attorney's fees for its work in litigating important issues under the ESA. *CTWCD V*, *supra*, 748 F.2d at 525.

The decision below conflicts with the standards announced in *Ruckelshaus v. Sierra Club*, *supra*. This Court in *Ruckelshaus* rejected a fee award to a party which did not prevail on any litigated claims under the Clean Air Act. While foreclosing fee awards to losing parties, however, the Court reasoned that Congress intended prevailing and partially prevailing parties under federal environmental laws to receive attorney's fees *absent* exceptional circumstances. Thus the decision in *Ruckelshaus* rejects the holding of the Ninth Circuit in the instant case that prevailing parties must nonetheless be forced to demonstrate the substantial or exceptional nature of their contribution to litigation before receiving fee awards.[13]

In *Ruckelshaus* this Court reversed a decision by the Court of Appeals for the District of Columbia in *Sierra Club v. Gorsuch*, 672 F.2d 33 (D.C. Cir. 1982). There the court awarded attorney's fees to the Sierra Club and the Environmental Defense Fund, despite rejecting all claims on the merits, on the grounds that such an award was

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[12]A party is considered to have prevailed "for attorney's fees purposes if they succeed on any significant issue in litigation which achieves some of the benefit which the part[y] sought in bringing suit." Hensley v. Eckerhart, 461 U.S. 424, 433 (1983).

[13]While the application for attorney's fees in Ruckelshaus was made only under the Clean Air Act, the Court made clear that its interpretation of when fee awards were "appropriate" would also control fee applications under identical federal environmental laws, including the ESA. Ruckelshaus v. Sierra Club, supra, 103 S.Ct. at 3275-6, n.1. Thus the Court's interpretation is controlling in the instant case.

appropriate due to the substantial nature of their contribution to the implementation and enforcement of the Clean Air Act. *Id.* at 39-41.

Rejecting that reasoning, this Court in *Ruckelshaus* held that Congress, by using the phrase "may award [attorney's fees] . . . to any party, . . . whenever appropriate," intended to expand fee awards only to include *partially* prevailing parties.

> Section 307(f) was meant to expand the class of parties eligible for fee awards from prevailing parties to *partially prevailing* parties—parties achieving *some success*, even if not major success. Put differently, by enacting § 307(f), *Congress intended to eliminate both the restrictive readings of "prevailing party" adopted in some of the cases cited above and the necessity for case-by-case scrutiny by federal courts into whether plaintiffs prevailed "essentially" on "central" issues.* (Emphasis in original and added.)

*Ruckelshaus v. Sierra Club, supra*, 103 S.Ct. 3279.

The issue which affects prevailing litigants in light of the Ninth Circuit's decision in the instant case is the extent to which they are now required to relitigate requests for attorney's fees after prevailing or "showing some success" on the merits. The Ninth Circuit's fundamental flaw lies in its failure to recognize that Congress intended in cases such as the present one to avoid lengthy, complex and time-consuming inquiries into the substance of a prevailing party's contribution, a fact readily observed by this Court in *Ruckelshaus* (*see* preceding quotation).

Thus, in addition to the chilling effect on private enforcement of federal environmental law, the decision of the Ninth Circuit will result in an unnecessary commitment of

limited judicial resources and further uncertainty as to when prevailing parties are entitled to attorney's fees. Such unmanageable results have before received the scorn of this tribunal.

> In systemic terms, attorney's fee appeals take up lawyers' and judges' time that could more profitably be devoted to other cases, including the substantive civil rights claims that § 1988 was meant to facilitate. Regular appellate scrutiny of issues like those in this case also generates a steady stream of opinions, each requiring yet another to harmonize it with the one before or the one after. Ultimately, § 1988's straightforward command is replaced by a vast body of artificial, judge-made doctrine, with its own arcane procedures, which like a Frankenstein's monster meanders its well-intentioned way through the legal landscape leaving waste and confusion (not to mention circuit-splits) in its wake. Within the confines of individual cases, from prevailing plaintiffs' point of view, appellate litigation of attorney's fee issues increases the delay, uncertainty, and expense of bringing a civil rights case, even after the plaintiffs have won all the relief they deserve. *Hensley v. Eckerhart, supra,* 461 U.S. at 455-6 (Brennan, J., concurring in part and dissenting in part).

As a prevailing party the Tribe intends by this petition to eliminate the waste and confusion invited upon the legal landscape by the Ninth Circuit's decision.

Significantly, in practical terms the result in *Ruckelshaus* will not divest trial courts of the discretion to deny fee awards to prevailing parties in clearly inappropriate circumstances. As the Court there noted:

> Of course, we do not mean to suggest that trivial success on the merits, or purely procedural victories, would justify an award of fees under statutes setting out the "when appropriate" standard. Rather, Con-

> gress meant merely to avoid the necessity for lengthy inquiries into the question whether a particular party's success was "substantial" or occurred on a "central issue."

*Ruckelshaus v. Sierra Club, supra,* 103 S.Ct. 3279, n.9.[14]

Such was not the case here, however. The Tribe was an active participant in the litigation from the outset, investing a substantial amount of time and resources on legal and other expert witness fees both in the pre-trial discovery phase and at trial. As described *supra,* oftentimes the Tribe's interests were not in alignment with those of the United States. But for the Tribe's active involvement those interests would not have been adequately protected by the federal government. Thus the Tribe's involvement can scarcely be described as frivolous, parasitic or trivial.

This Court's reasoning in *Ruckelshaus* is also consistent with the intent of Congress that prevailing parties are entitled to recover attorney's fees. For example, Senator Tunney of California, a principal sponsor and proponent of many of the federal environmental laws referred to here, noted with particular relevance to this issue that "a successful plaintiff should ordinarily recover in [sic] attorneys' fee *unless special circumstances would render an award unjust.*" (Emphasis added.)[15]

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[14]In liberalizing fee awards to environmental litigants Congress sought to encourage private enforcement of federal environmental laws while at the same time protecting against abuse: to discourage frivolous litigation and "parasitic intervention by parties having nothing to add but eager to collect costs and fees." Alabama Power Company v. Gorsuch, 672 F.2d 1, 30 (D.C. Cir. 1982).

[15]S. Rep. No. 3149, 94th Cong., 2d Sess. § 19(c) (3) (1976); H.R. Rep. No. 14032, 94th Cong., 2d Sess. § 19(c) (3) (1976),

(Continued on next page)

Moreover, in a painstaking analysis of the legislative history of the fees provision of the Clean Air Act, Judge Wilkey, in *Alabama Power Company v. Gorsuch, supra* (dissenting on a separate issue), concluded that Congress clearly intended a prevailing party status to be a sufficient condition for the recovery of attorney's fees.

> It is fair to conclude that prevailing is not a necessary condition for the award of attorneys' fees and costs, though it is sufficient. Congress, that is, generally intended that an award be made when a petitioner prevailed, plus in some other instances as well.
>
> • • •
>
> If the idea is to encourage "legitimate actions," "proper implementation," or suits in the "public interest," an award to parties who prevail would seem to be required by the legislative history.

*Alabama Power Company v. Gorsuch, supra,* 672 F.2d at 13-14).

In sum, Congress did not intend nor has any court confronted with this question interpreted Congress as intending to impose a substantial contribution test upon prevailing parties before recovery of attorney's fees. Thus the decision of the Ninth Circuit represents an aberration which this Court should review and correct.

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(Continued from previous page)

reprinted in *Legislative History of the Toxic Substances Control Act* at 136, 727-28 (1976); *quoted in* Environmental Defense Fund v. Environmental Protection Agency, *supra,* 672 F.2d at 49; also in Village of Kaktovik v. Watt, 689 F.2d at 225. Significantly, the court in Kaktovik limited those special circumstances where an award to a prevailing party would be unjust to situations where a suit was "filed for the sake of mere harassment." *Id.,* 689 F.2d at 224, n.14.

### B. The Ninth Circuit's Decision Conflicts With Decisions Of Other Circuits Relating To Fee Awards In Environmental Litigation.

The decision in the present case, imposing the substantial contribution standard upon a prevailing party in litigation on the merits under the ESA, conflicts with earlier decisions of other courts of appeals.

The Court of Appeals for the District of Columbia does not impose a substantial contribution test upon prevailing parties. In *Environmental Defense Fund v. Environmental Protection Agency, supra,* the court awarded attorney's fees of $156,000.00 to the plaintiff environmental organization which prevailed in litigation challenging the validity of the EPA's regulations under the Toxic Substances Control Act, 15 U.S.C. § 2601 *et seq.*, governing the disposal, marking, manufacture, processing, distribution and use of polychlorinated biphenyls (PCB's).

No mention whatsoever was made of the substantial contribution test in the decision awarding attorney's fees. The court was satisfied that the plaintiff's prevailing on the merits was sufficient to entitle it to receive attorney's fees. This is especially significant in light of the fact that the decision came down the same day as two other decisions from the Court of Appeals for the District of Columbia imposing the substantial contribution test in cases where *losing* parties applied for attorney's fees. *Alabama Power Company, supra; Sierra Club v. Gorsuch, supra. See also Village of Kaktovik v. Watt, supra,* 689 F.2d at 228. The clear implication is that the Court of Appeals for the District of Columbia did not then and does not now consider

it necessary to impose a substantial contribution test on prevailing parties.

The Third Circuit Court of Appeals has also imposed the substantial contribution test only upon losing parties. *Delaware Citizens for Clean Air, Inc. v. Stauffer Chemical Company,* 510 F.2d 969 (3d Cir. 1975), *affirming Delaware Citizens for Clean Air, Inc. v. Stauffer Chemical Company,* 62 F.R.D. 353 (D. Del. 1974).[16]

In conclusion, it is abundantly evident that the decision of the Ninth Circuit in this case is squarely at odds with the decision in *Ruckelshaus,* and will result in unnecessary litigation over the circumstances under which prevailing parties are entitled to attorney's fees. Such a result was not intended by Congress when enacting the fees provision of the ESA and other federal environmental statutes, nor has it been imposed by other courts of appeals which have decided fee application cases.

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[16]There the district court stated that:

> "[A]ppropriate" should be read in the context of the pre-existing notions about the circumstances under which one party may fairly be required to bear his adversary's costs of litigation. In this context it seems to this Court that success or failure must be given substantial weight and that *an award of counsel fees to a losing party should be reserved for those cases in which either the litigation, though ultimately unsuccessful, serves the objectives of the Act in some substantial way or in which other exceptional circumstances tip the balance of the equities decidedly in the losing party's favor.* (Emphasis added.)

Citizens for Clean Air, Inc., *supra,* 62 F.R.D. at 355, *quoted in* Sierra Club v. Gorsuch, *supra,* 672 F.2d at 36, n.4; and Village of Kaktovik v. Watt, *supra,* 689 F.2d at 228.

## III. The Decision Of The Ninth Circuit Must Be Reviewed Because Of Its Inconsistency With Decisions Of This Court Intepreting The Attorney's Fees Provisions Of Federal Civil Rights Laws.

### A. The Fees Provisions Of The Federal Civil Rights Laws Are Similar To But More Restrictive Than The Fees Provision Of The Endangered Species Act.

By referring to other similar legislation and the decisions of courts interpreting that legislation a court can learn of and give effect to the true intent of Congress in subsequent legislation, thereby establishing a more uniform and harmonious system of law. Sutherland, *Statutory Construction* §§ 53.01, .03 (4th ed. 1973 by C. Sands). To that end, it is necessary and useful to analogize to the award of attorney's fees under the federal civil rights laws and of the decisions of this Court interpreting those fees provisions.

The attorney's fees provisions of both Title II and Title VII of the Civil Rights Act of 1964, and the Civil Rights Attorney's Fees Award Act of 1976, contain identical standards for the award of attorney's fees. All three provide that "the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs." *See* 42 U.S.C. §§ 2000a-3(b); 2000e-5(k); and 42 U.S.C. § 1988.

The fees provisions of the federal civil rights and environmental laws are similar in that both make fee awards discretionary with the court considering the award. The major difference is with respect to the party receiving the award: in the civil rights context a party must prevail while in federal environmental litigation, includ-

ing litigation under the ESA, *any party* may receive fees when the court determines such an award is appropriate. Courts interpreting this distinction—including this Court—have interpreted congressional intent as liberalizing fee awards to prevailing environmental litigants. *See Ruckelshaus v. Sierra Club, supra*, 103 S.Ct. at 3279.

### B. Accordingly, The Ninth Circuit Decision In This Case Conflicts With Decisions Of This Court Interpreting Fees Provisions Of Federal Civil Rights Laws By Imposing A More Restrictive Standard Of Recovery On Prevailing Parties.

In civil rights litigation, this Court has unequivocally stated that a prevailing party is entitled to an award of attorney's fees "unless special circumstances exist which would render an award unjust." *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968). In interpreting this standard this Court has described a court's discretion to deny fees to a prevailing party under Titles II or VII as "narrow." *New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54, 68 (1980). More recently this Court reaffirmed its holding in *Newman* that, in civil rights cases where counsel fees are allowed by Congress, the award should be made to the successful party "absent *exceptional* circumstances." (Emphasis added.) *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 262 (1975).

The Court of Appeals for the District of Columbia has analogized to the federal civil rights laws to determine appropriate circumstances under which to deny prevailing parties fee awards. As quoted earlier, the court in *Village of Kaktovik v. Watt, supra*, noted:

> ESA's equally limited history states that its "language is parallel to that contained in the recent Marine, Protection, Research and Sanctuaries Act of 1972, and is to be interpreted in the same fashion. H.R. Rep. No. 412, 93d Cong., 1st Sess. 19 (1973). *The history of the Act alluded to endorses awards where "the suit was meritorious, and not filed for the sake of mere harassment".* S. Rep. No. 451, 92d Cong., 1st Sess. 23 (1971); H.R. Rep. No. 361, 92d Cong., 1st Sess. 23 (1971). (Emphasis added.)

*Village of Kaktovik v. Watt, supra,* 689 F.2d at 224-25 n.14. *See also Environmental Defense Fund v. Environmental Protection Agency, supra,* 672 F.2d at 49, quoting the remarks of Senator Tunney that "a successful plaintiff should ordinarily recover in [sic] attorneys' fee unless special circumstances should render an award unjust."

This reasoning has also been adopted on several occasions by other lower courts considering fee awards under federal environmental laws. For example, in *Save Our Sound Fisheries Ass'n v. Callaway,* 429 F. Supp. 1136 (D.R.I. 1977), the court held that Congress' intent in enacting the attorney's fees provisions of the Federal Water Pollution Control Act of 1972, 33 U.S.C. § 1415(g)(4), and the Marine Protection, Research and Sanctuaries Act of 1972, 33 U.S.C. § 1415(g) (4), was to require attorney's fees awards to prevailing parties unless there was evidence of bad faith. *Save Our Sound Fisheries v. Callaway, supra,* 429 F. Supp. at 1145-46, *citing Newman v. Piggie Park Enterprises, supra.*

In summary, parallels exist between the standards for awarding attorney's fees to prevailing parties under the ESA and the federal civil rights laws. Yet Congress intended and this Court has clearly interpreted the fees

provisions in federal environmental laws to allow for an expansion of fee awards as compared to fee applications in the civil rights context. Accordingly, it is illogical and unsupportable for the Ninth Circuit to hold the Tribe, a prevailing party in the present case, to a higher, more restrictive standard than the standard under the federal civil rights laws.

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## CONCLUSION

The Supreme Court in *Ruckelshaus* foreclosed the availability of attorney's fees to losing parties under the attorney's fee provision of the Clean Air Act and sixteen other federal environmental statutes, including Section 1540(g)(4) of the ESA. The Court held that a party which does not prevail at all on the merits is not entitled to a fee award. On the other hand, the Court held that a party seeking to enforce a statue which achieves some success on the merits is entitled to recover a fee award absent exceptional circumstances.

At issue in the present case is whether the Pyramid Lake Paiute Tribe, despite its status as a prevailing party, must nonetheless be required to make an independent showing that its contribution to the enforcement and implementation of the Endangered Species Act was exceptional and substantial before recovering attorney's fees. By requiring such a showing the Ninth Circuit's decision is fundamentally flawed and inconsistent with the intent of Congress, decisions of other courts of appeals, and of this Court in *Ruckelshaus*.

Moreover, the Ninth Circuit's decision is inconsistent with decisions of this Court interpreting the attorney's fees provisions of the federal civil rights laws, which call for awards to prevailing parties in all but exceptional circumstances. This inconsistency cannot be allowed to stand in light of the clear congressional intent to liberalize fee awards in environmental litigation as compared to fee awards in civil rights lawsuits.

For these reasons, this Court should grant the petition for certiorari to review the significant implications of the Ninth Circuit's decision below and reverse the judgment thereof with instructions to remand for determination of a reasonable fee.

Respectfully submitted,

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## APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

Civil No. R-76-152 GJS

CARSON-TRUCKEE WATER CONSERVANCY DISTRICT, et al.,

Plaintiffs,

vs.

JAMES G. WATT, Secretary of the Interior, et al.,

Defendants,

and

PYRAMID LAKE PAIUTE TRIBE OF INDIANS,

Defendant-Intervenor.

### OPINION

(Filed September 29, 1983)

SOLOMON, Judge:

On December 22, 1982, I granted the motion of defendant-intervenor, Pyramid Lake Paiute Tribe of Indians (Tribe), for costs, expert witness fees, and attorney fees limited to the issues under the Endangered Species Act (ESA).

Thereafter, the Tribe filed an application for fees in which it sought $545,292 in attorney fees and costs.

During my examination of the exhibits and briefs submitted in support of and in opposition to the requested award, I became concerned that an award of attorney fees, particularly of the size requested, was inappropriate under the facts of this case. I therefore requested argument on the propriety of my order granting fees, and also

on the issue of the amount of such fees if any were to be allowed.

On the basis of the oral arguments, written brief and my reexamination of the record, including briefs on attorney fees, I have concluded that an award of attorney fees to the Tribe in any amount would be inappropriate.

Plaintiffs Carson-Truckee Water Conservancy District, Sierra Pacific Power Company and the State of Nevada, filed this action in which they seek to appropriate water from the Lower Truckee River for municipal and industrial (M & I) purposes. They contend that the Secretary of the Interior (Secretary) and other federal defendants, by failing to obtain reimbursement for the costs of constructing Stampede Dam and Reservoir (Stampede), violated the Washoe Project Act and related reclamation laws.

The Government or the Tribe or both over a period of many years have filed a number of cases to obtain additional water for the Tribe. Some of these cases were decided against the Government and the Tribe, and others are still pending. One of these cases was recently decided by the Supreme Court of the United States. *Nevada v. United States*, — U.S. —, 103 S.Ct. 2906 (1983). There, the district court rejected the demand of the Government for reserve water rights for the Tribe for fishery purposes. The Court of Appeals partly reversed that decision. Later, the Court of Appeals' decision was reversed by the Supreme Court which held that res judicata prevents the United States and the Tribe from litigating their claims.

The Government in its answer to plaintiffs' complaint in this case, raised many issues as defenses including the defense of the ESA.

The Tribe filed a motion to intervene in this case asserting that it "has an interest in the subject matter of the action as the beneficial or equitable owner of the rights to the use of the waters of the Truckee River including those stored in Stampede Reservoir . . . ." The motion was granted. Thereafter, the Tribe made a number of legal contentions. First, the Tribe contended that the Government had trust obligations which made it improper to compel the Secretary to sell water which was subject to the reserve water rights claimed by the Government and the Tribe in *Nevada v. United States, supra.* Second, the Government cannot be compelled to sell water necessary to enable the Tribe to take advantage of Pyramid Lake fishery and to become economically self-sufficient. Third, the Secretary cannot be compelled to violate the existing court order in *Pyramid Lake Paiute Tribe of Indians v. Morton.* The Tribe also raised the defense of ESA.

In addition to these substantive defenses, the Tribe raised a number of technical defenses. They are:

> (1) Do plaintiffs have standing to challenge the Secretary's action?
>
> (2) Do the plaintiffs have a private right of action under the reclamation laws?
>
> (3) Is the government required to obtain a reimbursement contract? If so, can reimbursement be achieved through a contract to supply M&I water to the District?

These technical defenses were the basis for my opinion reported at 537 F. Supp. 106. My opinion discussed the technical issues raised by the Government and the Tribe and concluded with the following statement:

> I hold that the plaintiffs have standing to maintain this action, and that they have a private right of action under the Administrative Procedure Act to enforce the Secretary's reimbursement obligation. The Secretary is required to sell all of Stampede's water except that which is necessary to fulfill his trust obligations to the Tribe and to protect the endangered species which spawn in the Lower Truckee River.

In that opinion, I also denied the claim of the State of Nevada that "the Secretary needs a permit from the State of Nevada for Stampede's present operations."

I reserved decision on the amount of water the Secretary must provide (1) to satisfy his obligations under the ESA to conserve the endangered and threatened species of Pyramid Lake, and (2) to satisfy his trust obligations to preserve the Pyramid Lake fishery for the benefit of the Tribe.

All parties agreed that the Secretary has obligations under the ESA and under his trust obligations to the Tribe which take precedence over his obligations to store water for M & I uses. The only issue was the amount of water necessary to fulfill those obligations.

The evidence at the trial consisted primarily of the testimony of experts presented in written statements and exhibits submitted by all of the parties, particularly the plaintiffs and the Tribe. I found that there was substantial evidence to support the Secretary's plan for operating Stampede, to restore the qui-ui to a non-endangered sta-

tus, and to restore the Lahontan cutthroat trout to the point where it is no longer a threatened species.

I did not determine the amount of water necessary to satisfy the Tribe's fishery rights because the Supreme Court had not yet determined those rights in *Nevada v. United States.* I held it was not necessary to make that determination because all of that water will be necessary for many years to come for the qui-ui and the Lahontan cutthroat trout in order to remove them from their threatened or endangered status.

On the basis of my decision, the Tribe requested attorney fees not only from the plaintiffs but also from the Government. This application was made under the provisions of the Endangered Species Act, 16 U.S.C. § 1531 *et seq.,* particularly section 1540(g)(4) which permits an award of attorney fees whenever the court determines such an award is appropriate. This is the only statute under which the Tribe can obtain attorney fees.

The Tribe participated in this action primarily for its own benefit; that is, to obtain water rights, to establish a fishery, and to require the Government to furnish it water in compliance with the Government's trust obligations. Nevertheless, the self-interests of the Tribe would not bar it from obtaining an award of attorney fees. But to obtain such an award, I believe it is imperative that the Tribe show that the litigation involved important, complex or novel issues, that the case aided in interpreting the Act, and that the Tribe's efforts substantially contributed to the goals of the ESA. "[T]he dominant consideration is whether litigation by that party has served the public interest by assisting the interpretation and implementation" of the statute. *Alabama Power Company v. Gorsuch,* 672

F.2d 1, 3 (D.C. Cir. 1982); *see also Sierra Club v. Gorsuch,* 672 F.2d 33 (D.C. Cir. 1982) and *Environmental Defense Fund v. Environmental Protection Agency,* 672 F.2d 42 (D.C. Cir. 1982).

I have concluded that this case will not substantially contribute to ESA goals. All parties conceded that the Secretary has obligations under the ESA which take precedence over his obligations to store water for M & I uses. The only ESA issue to be resolved, therefore, was the amount of water necessary to carry out the purposes of the Act. While this is important, it does not meet the standard set out in *Alabama Power v. Gorsuch* and the companion cases.

In addition, the Secretary had already commenced a program to help the qui-ui and Lahontan cutthroat trout. The Government had raised the defense of the ESA in its original answer and was actively and energetically participating in the trial of the case. The Tribe concedes that the counsel for the Government did a first-class job in defending the case, and that the Government made significant financial contributions towards its defense.

The Tribe entered the case primarily for its own economic self-interest. Most of the issues it raised, particularly those of a technical nature like the standing of the plaintiffs, were not intended to, nor did they, assist in the interpretation or implemention of the Act. In fact, some of these defenses, if they had been successful, would have had the opposite effect.

In light of all the facts, I have concluded that my earlier ruling granting attorney fees and costs for the Tribe's attorneys was ill-advised and should be vacated.

Plaintiffs interpret 16 U.S.C. § 1540(g)(1) to mean that costs, including attorney fees and expert witness fees, may be awarded to a party under 16 U.S.C. § 1540(g)(4) only when the party commences the action. Plaintiffs assert that here the Tribe did not commence the action but raised ESA as one of a number of defenses, and that as a matter of law the Tribe may not recover costs and attorney fees under ESA.

Although I do not read the statute that narrowly, it is unnecessary for me to decide this issue because I have now concluded that it is not appropriate to grant the Tribe costs and attorney fees.

DATED this 26th day of September, 1983.

/s/ Gus J. Solomon
United States District Judge

## APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 83-2542
(D.C. No. CV R-76-152 GJS)

CARSON-TRUCKEE WATER CONSERVANCY DISTRICT; SIERRA PACIFIC POWER COMPANY, a corporation; and STATE OF NEVADA,

Plaintiffs-Appellees,

vs.

SECRETARY OF THE INTERIOR, et al.,

Defendants,

PYRAMID LAKE PAIUTE TRIBE OF INDIANS,
Defendant-Intervenor-Appellant.

Appeal from the United States District Court
for the District of Nevada

Honorable Gus J. Solomon, District Judge, Presiding
Argued and Submitted May 16, 1984

Before: DUNIWAY, SCHROEDER and NORRIS,
Circuit Judges

OPINION

(Filed November 28, 1984)

DUNIWAY, Circuit Judge:

The Pyramid Lake Paiute Tribe, having successfully intervened in the Water District's suit against the Secretary of the Interior, unsuccessfully sought attorney fees under the Endangered Species Act, 16 U.S.C. § 1540(g)(4). *Carson-Truckee Water Conservancy Dist. v. Watt,* D. Nev.,

1983, 575 F. Supp. 467, (*Carson-Truckee III*). The Tribe appeals, arguing that the court applied the wrong legal test to determine whether an award of attorney fees was "appropriate." We affirm.

## I. FACTS.

The underlying suit is one of many, over the years, involving water rights in the Truckee river area of California and Nevada. The Water District, Sierra Pacific Power Company, and the State of Nevada sued officials of the Department of Interior, seeking to force sale of water impounded behind the Stampede Dam on the Little Truckee River under the Washoe Project Act, 43 U.S.C. § 614. Interior has used the water primarily to reestablish in Pyramid Lake two species of fish—the cui-ui fish, an endangered species, and the Lahontan cutthroat trout, a threatened species—whose survival other diversions of water from the Truckee system has imperiled. The Tribe, opposing the sale of water for municipal and industrial use in the Reno-Sparks area, intervened as a defendant in the suit.

In the first phase of the case, the district court rejected several of the Tribe's defenses, holding that Interior must sell the Water District whatever Stampede Dam water was not needed to fulfill trust obligations to the Tribe and to protect the fish. *Carson-Truckee Water Conservancy District v. Watt*, D. Nev. 2982 [sic], 537 F. Supp. 106, (*Carson-Truckee I*). In the second phase, the district court held that, under the Endangered Species Act, Interior must give species conservation priority over other purposes of Stampede Dam until the fish are no longer threatened. *Carson-Truckee Water Conservancy District*

*v. Watt,* D. Nev. 1982, 549 F. Supp. 704, (*Carson-Truckee II*). The district court also held that because the Endangered Species Act requirements controlled the outcome, Interior's trust obligations to the Tribe were not ripe for decision. *Id.* at 713. We recently reviewed these decisions on the merits. *Carson-Truckee Water Conservancy District v. Watt,* 9 Cir., 1984, 741 F.2d 257, (*Carson-Truckee IV*).

Meanwhile, the district court granted the Tribe's motion for costs, expert witness fees, and attorney fees for services related to the issues under the Endangered Species Act. Upon receiving the Tribe's application, however, the district court became concerned about whether an award of attorney fees, particularly tthe amount requested, was appropriate under the facts of the case. After hearing fresh argument, the district court concluded that an award of attorney fees to the Tribe in any amount was inappropriate. The Tribe appeals.

## II. MERITS.

### A. *Standard of Review.*

The Tribe argues that the district court applied the wrong legal standard in denying attorney fees to the Tribe. Such questions of law are freely reviewable on appeal. *Societe de Conditionment v. Hunter Engineering Co., Inc.,* 9 Cir., 1981, 655 F.2d 938; 941; *Miller v. United States,* 9 Cir., 1978, 587 F.2d 991, 994. However, if the district court applied the correct legal standard, we review attorney fees awards under the Endangered Species Act for abuse of discretion. *Cf. United States v. First Nat. Bank of Circle,* 9 Cir., 1984, 732 F.2d 1444, 1446.

B. *The Statute.*

The citizen suit provisions of the Endangered Species Act authorize attorney fees awards when "appropriate":

> The court, in issuing any final order in any suit brought pursuant to paragraph (1) of this subsection, may award costs of litigation (including reasonable attorney and expert witness fees) to any party, *whenever the court determines such an award is appropriate.*

16 U.S.C. § 1540(g)(4) (emphasis added).

C. *The Trial Court's Decision.*

The district court first stated the following standard:

> [T]o obtain such an award, I believe it is imperative that the Tribe show that the litigation involved important, complex or novel issues, that the case aided in interpreting the Act, and that the Tribe's efforts substantially contributed to the goals of the ESA. "[T]he dominant consideration is whether litigation by that party has served the public interest by assisting the interpretation and implementation" of the statute. *Alabama Power Company v. Gorsuch,* 672 F.2d 1, 3 (D.C. Cir. 1982); *see also Sierra Club v. Gorsuch,* 672 F.2d 33 (D.C. Cir. 1982); and *Environmental Defense Fund v. Environmental Protection Agency,* 672 F.2d 42 (D.C. Cir. 2982) [sic].

575 F. Supp. at 469.

D. *The Tribe's Argument.*

The Tribe offers a two-step argument. It argues, first, that the Court of Appeals for the District of Columbia devised a dual standard of "appropriateness" for statutes such as § 1540(g)(4), depending on whether the requesting party prevailed on the merits, and that in our

case the district court erroneously applied the non-prevailing party standard. It argues, second, that in a decision announced three months before the district court's decision, the Supreme Court held that non-prevailing parties are not eligible for attorney fees awards. *Ruckelshaus v. Sierra Club,* 1983, — U.S. — (slip op., July 1, 1983). Thus, says the Tribe, the Court abolished the non-prevailing party standard that the district court erroneously relied on. We think, however, that both steps of the argument are wrong.

First, the D.C. Circuit cases, *Alabama Power, Sierra Club,* and *Environmental Defense Fund, supra; see also Village of Kaktovik v. Watt,* D.C. Cir., 1982, 689 F.2d 222, 224-25, set forth no dual standard. These decisions held that, under the "when appropriate" standard (of the attorney fees provision of the Clear Air Act, 42 U.S.C. § 7607(f)), and similar provisions specifically including the Endangered Species Act, 16 U.S.C. § 1540(g)(4), courts could award attorney fees to non-prevailing parties as well as to prevailing parties. *See Ruckelshaus v. Sierra Club, supra,* — U.S. —, —, slip op. at 2 n.1; *Kaktovik,* 689 F.2d at 224 & n.14. These cases articulated "*one* standard for appropriateness, and that standard allows courts to award attorneys' fees to parties who have 'substantially contributed' to the goals of the . . . Act." *Sierra Club,* 672 F.2d at 42 n.10 (emphasis in the original). *See also id.* at 36: "the relevant inquiry is whether the litigation—successful or not—furthered the goals of the Act." The cases "made clear that whether the party claiming costs or fees has prevailed does not control the inquiry on appropriateness, and that the dominant consideration is whether litigation by the party has served the public interest by as-

sisting the interpretation or implementation of the . . . Act." *Alabama Power*, 672 F.2d at 3.

Although these cases involved non-prevailing parties, they noted that "even a prevailing or substantially prevailing party who does not substantially contribute to the goals of the . . . Act may not be entitled to attorneys' fees." *Sierra Club*, 672 F.2d at 38 n.8. "Although a complainant may have substantially prevailed in an action, the award of costs and attorney fees does not automatically follow. There are other factors which the court should consider in determining the appropriateness of an award of costs and attorney fees." *Id.* at 39 n.8, quoting *Cuneo v. Rumsfeld*, D.C. Cir., 1977, 553 F.2d 1360, 1365. *See also Roosevelt Campobello Intern. Park Comm. v. Environmental Protection Agency*, 1 Cir., 1983, 711 F.2d 431, 439-41 & n.15 (awarding fees for prevailing issues proportional to the extent of the party's contribution to the development of the issues, but not for non-prevailing issues, while noting that "success is, of course, not the only criterion"); *Kaktovik, supra*, 689 F.2d at 228 & n.44 ("while prevailing vel non is not to be a conclusive factor, it may be a relevant consideration" in determining whether a party's contribution is substantial); *Florida Power & Light Co. v. Costle*, 5 Cir., 1982, 683 F.2d 941, 943 (awarding fees to the prevailing party not automatically, but because result of suit will aid in the proper implementation and interpretation of the statute). We reject the Tribe's first argument, that the district court chose the wrong one of two standards.

As a second step, the Tribe argues that *Ruckelshaus*, in reversing the D.C. Circuit's decision in *Sierra Club* that nonprevailing parties are eligible for attorney fees, also eliminated the "substantial contribution" standard for

non-prevailing parties. The Tribe argues that the test of "appropriateness" under *Ruckelshaus* is simply whether the claimant achieved "some degree of success on the merits." *See Ruckelshaus,* slip op. at 13. Because the Tribe had some degree of success on the merits, it argues, it is entitled to an award of attorney fees as a matter of law. We disagree.

*Ruckelshaus* decided that it is not "appropriate" to award attorney fees to a party that achieved no success on the merits of its claims. Slip. op. at 2; *see Northern Plains Resource Council v. EPA,* 9 Cir., 1984, 734 F.2d 408. The Court held that Congress intended the "when appropriate" standard to permit awards to partially as well as fully prevailing parties. The Tribe invalidly infers from this holding that all parties who achieve some degree of success on the merits are not only eligible for, but are entitled to attorney fees. But *Ruckelshaus* dealt only with eligibility for, not with entitlement to, a statutory award. *See* slip op. at 10 n.11 (distinguishing permissive and mandatory statutory language); *Sierra Club,* 672 F.2d at 38 n.8 (distinguishing issues of eligibility and entitlement). Nothing in *Ruckelshaus* suggests that the Court meant to reject the rule that, under the "when appropriate" standard, an eligible party must make a substantial contribution to the goals of a statute to be entitled to attorney fees.

The Tribe further argues that the proper standard for awarding attorney fees to prevailing parties is the standard adopted under the attorney fees provision of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000a-3(b), 2000e-5(k), and the Civil Rights Attorneys' Fees Act of 1976, 42 U.S.C. § 1988. But while the D.C. Circuit cases involve attorney

fees provisions that are "identical" to 16 U.S.C. § 1540 (g)(4), *Ruckelshaus, supra,* slip op. at 2 n.1, the Civil Rights statutes involve the different "prevailing party" statutory standard, under which a prevailing plaintiff "should ordinarily recover an attorney's fees unless special circumstances would render such an award unjust," *Newman v. Piggie Park Enterprises, Inc.,* 1968, 390 U.S. 400, 402; but a prevailing *defendant* may get attorney fees only if the plaintiff's action was frivolous, meritless, or groundless, *Hughes v. Rowe,* 1980, 449 U.S. 5, 14-15. *See Ruckelshaus,* slip op. at 7-9. Because *Ruckelshaus* did not disapprove the D.C. Circuit standard for "when appropriate" statutes, but only its application to non-prevailing parties, the district court stated the correct standard.

E. *Application of the Standard.*

The district court stated its reasons for concluding that the Tribe's participation in this action did not substantially contribute to the goals of the Endangered Species Act. The issue under the Act was relatively narrow; the government had raised the issue before the Tribe intervened, and had energetically litigated the issue; and the Tribe raised defenses that were inconsistent with assisting in the interpretation or implementation of the Act. *Carson-Truckee III,* 575 F. Supp. at 469-70. We hold that the district court did not abuse its discretion.

F. *Posture of the Case.*

The attorney fees statute authorizes awards "in any suit brought pursuant to paragraph (1) of this subsection." 16 U.S.C. § 1540(g)(4). Paragraph (1) provides that "any citizen may commence a civil suit" against any

person or governmental entity that violates the Act, or against Interior to compel enforcement of the Act. *Id.* § 1540(g)(1). The Water District had argued that because this is not literally such a suit, the attorney fees provision does not apply. *See Roosevelt Campobello*, 711 F.2d at 440 (raising but not resolving this question). While indicating that it disagreed with the Water District's argument, the district court declined to decide the issue because it had concluded that an award was not appropriate. 575 F. Supp. at 470. We, too, decline.

Affirmed.

## APPENDIX C

(SEAL)

UNITED STATES DEPARTMENT OF THE INTERIOR
Fish and Wildlife Service
Washington, D.C. 20240

In Reply Refer To:
FWS/OES

Memorandum

To: Regional Director, Regions 1, 2, 3, 4, 5, 6, and 7 (ARD/FA or ARD/AFF) Acting Associate

From: Director

Subject: Solicitor's Opinion Regarding Endangered Species Act (ESA) Conservation Obligations of Federal Agencies

Attached, please find the above-mentioned Solicitor's (SOL) opinion (dated September 7, 1983). In it, SOL rejects the district court's conclusion that (Section 7(a)(1) of the ESA) can mandate a *particular* conservation program for a listed species at the expense of other project objectives. In other words, SOL feels Federal agencies have the authority to integrate endangered species conservation into project planning but are not required to do so in any particular manner. The only mandatory requirement placed on Federal agencies is to insure that their actions are not likely to jeopardize listed species (Section 7(a)(2) of the ESA). Thus, Biological Opinions should not include statements saying that unless a given agency adopts a particular conservation recommendation, it will be "in violation of its Section 7(a)(1) responsibilities."

The district court's decision is not precedent setting and should be applied only to the Stampede Reservoir case.

/s/ Roman H. Koenings

Attachment

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UNITED STATES DEPARTMENT OF THE INTERIOR

Office of the Solicitor
Washington, D.C. 20240

(September 7, 1983)

Memorandum

To: Director, United States Fish and Wildlife Service

From: Associate Solicitor, Conservation and Wildlife

Subject: Endangered Species Act conservation obligations of Federal agencies

We have recently reviewed the district court opinion in *Carson-Truckee Water Conservancy District v. Watt,* 549 F. Supp. 704 (D. Nev. 1982), *appeal filed* No. 83-1549 (9th Cir., Jan. 3, 1983), which discussed the conservation obligations of Federal agencies under the Endangered Species Act of 1973 (ESA), as amended, 16 U.S.C. §§ 1531 *et seq.* In the *Carson* case, the plaintiffs sought to force the Bureau of Reclamation to store additional water in the Stampede Reservoir for municipal and industrial use. Ultimate diversion of the stored water for such uses would reduce the flow of water into Pyramid Lake, the habitat for two fish which are listed under the ESA. The plaintiffs had contended that the ESA did not prevent the Secretary

from operating Stampede Reservoir for municipal and industrial uses as long as that operation would not jeopardize the continued existence of the cui-ui fish and the Lahontan cutthroat trout. In response to this contention, defendants argued that the Secretary had an affirmative obligation under the ESA to *conserve* those two fish above and beyond the substantive prohibition found in Section 7(a)(2) against jeopardizing their continued existence. The defendants thus cited this higher conservation responsibility as authority for operating Stampede Reservoir so as to aid in the recovery of the cui-ui and the Lahontan cutthroat trout. In ruling for the defendants, it is our opinion that the district court imposed greater burdens on federal agencies under the ESA than those originally intended by Congress. Our analysis follows.

*Statutory Framework*

Five subsections of the ESA are relevant for purposes of analyzing the district court's decision in the *Carson* case. First, subsection 2(c)(1) of the ESA sets forth the general hortatory policy that "all Federal departments and agencies shall seek to conserve endangered and threatened species and shall utilize their authorities in furtherance of the purposes of this chapter." 16 U.S.C. § 1531(c).

Second, subsection 3(3) of the Act, 16 U.S.C. § 1532(3), states in part:

> The terms "conserve", "conserving", and "conservation" mean to use and the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this Act are no longer necessary. . . .

A third relevant part of the ESA is subsection 5(a), 16 U.S.C. § 1534(a), which expressly confers upon the Secretary of the Interior the responsibility for implementing "a program to conserve fish, wildlife, and plants, including those which are listed as endangered species or threatened species pursuant to section 1533 of this title." This subsection has generally been considered to be the true source of the Secretary's affirmative conservation responsibilities under the ESA.

The two remaining relevant parts of the Act are subsections 7(a)(1) and 7(a)(2).[1] Subsection 7(a)(1), 16 U.S.C. § 1536(a)(1), restates the general hortatory language in subsection 2(c)(1) quoted above and constitutes an affirmative grant of authority to Federal agencies to aid in the conservation and recovery of listed species through existing agency programs:

> The Secretary shall review other programs administered by him and utilize such programs in furtherance of the purposes of this chapter. All other Federal agencies shall, in consultation with and with the assistance of the Secretary, utilize their authorities in furtherance of the purposes of this chapter by carrying out programs for the conservation of endangered species and threatened species listed pursuant to section 1533 of this title.

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[1]Before the enactment of the Endangered Species Act Amendments of 1978, Pub. L. No. 95-632, 92 Stat. 3751, the "conservation" and "jeopardize" standards of section 7 were combined in one lengthy sentence. The 1978 Amendments added an exemption process and divided the "conservation" and "jeopardize" provisions into separate sentences within subsection 7(a). Finally, the Endangered Species Act Amendments of 1979, Pub. L. No. 96-159, 93 Stat. 1241, separated the "conservation" and "jeopardize" standards into subsections 7(a) (1) and 7(a) (2), respectively.

Subsection 7(a)(2), 16 U.S.C. § 1536(a)(2), on the other hand, sets out the Act's major substantive limitation on the exercise of Federal agency discretion by requiring that each agency shall:

> in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency (hereinafter in this section referred to as an "agency action") is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with affected States, to be critical, unless such agency has been granted an exemption for such action by the Committee pursuant to subsection (h) of this action. . . .[2]

*Analysis*

Although the above subsections of the ESA constitute the relevant legal framework for addressing the issues raised in the *Carson* case, the district court only relied upon subsections 2(c)(1), 3(3) and 7(a)(2) in issuing its opinion. After a cursory recital of the provisions of the first two of those subsections, the district court cited the Supreme Court decision in *Tennessee Valley Authority v. Hill,* 437 U.S. 153 (1978) as standing for the proposition that the ESA "gives endangered species the highest priority over all federal projects." *Carson, supra,* 549 F. Supp. at 709. The district court then went on to cite and adopt the hold-

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[2]Subsection 7(a)(2) thus contains two substantive prohibitions: federal agencies shall not "jeopardize" the continued existence of a listed species or adversely modify its critical habitat. For purposes of this memorandum, any reference to the "jeopardy" prohibition under subsection 7(a)(2) should be understood to also include the prohibition against adversely modifying critical habitat.

ings of two migratory bird hunting regulation cases involving endangered species, *Defenders of Wildlife v. Andrus*, 428 F. Supp. 167 (D.D.C. 1977) and *Connor v. Andrus*, 453 F. Supp. 1037 (W.D. Tex. 1978).[3] Relying upon the above cases, the district court in the *Carson* case concluded that

> . . . the Secretary is required to give the Pyramid Lake fishery priority over all other purposes of Stampede until the cui-ui fish and the Lahontan cutthroat trout are no longer classified as endangered or threatened. *Carson, supra*, 549 F. Supp. at 710.

We disagree with this conclusion for a number of reasons. To begin with, no one disputes that the Secretary has express conservation responsibilities under the ESA. We have identified these responsibilities as arising specifically from subsection 5(a), and more generally from subsections 2(c)(1) and 7(a)(1), of the Act. Within the Department of the Interior, the agency that has been delegated the Secretary's affirmative conservation responsibilities under subsection 5(a) of the Act is the United States Fish and Wildlife Service. 242 D.M. 1.1A.

Coincidentally, it was also the Fish and Wildlife Service that was the defendant in the *Defenders of Wildlife* and *Connor* cases (relied upon by the district court in *Carson*). The Service was admonished in those two cases for only focusing on avoiding the "jeopardy" of listed species under its migratory bird hunting program. However, those cases did not ultimately turn on the Service's compliance with its conservation responsibilities under the ESA. Rather,

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[3]Those cases addressed the relationship between the Endangered Species Act, the Migratory Bird Treaty Act, 16 U.S.C. §§ 703 *et seq.*, and the Administrative Procedure Act, 5 U.S.C. §§ 551-559, 701-706.

they turned on the more narrow grounds of whether the Service had established an adequate administrative record regarding endangered species and migratory bird hunting so as to rebut the charge that the agency's hunting regulations were arbitrary and without a rational basis under the Administrative Procedure Act. In both cases, the Service's regulations were found to be arbitrary, albeit for entirely different reasons. Thus, instead of being viewed as authority for establishing a sweeping new set of stringent endangered species priorities, the *Defenders of Wildlife* and *Connor* cases should be read as fairly narrow cases under the Administrative Procedure Act which do no more than remind agencies of the need to clearly articulate the factual basis for their regulatory actions.

In addition to putting an inappropriate gloss on the *Defenders of Wildlife* and *Connor* cases, the district court in *Carson* also confused the set of priorities created by Congress under subsections 7(a)(1) and 7(a)(2). No one can dispute after *Tennessee Valley Authority v. Hill* that Congress established endangered species conservation as the highest priority under the latter subsection of the Act. When a proposed project is found likely to jeopardize the continued existence of a listed species, the project must either be exempted under the complicated procedure set forth in subsections 7(e) through (n) of the Act or be modified or abandoned altogether.

Moreover, as shown by the complex amendments to section 7 enacted in 1978, 1979, and 1982, it has been subsection 7(a)(2), with its rigid set of priorities and procedures, that has generated the most Congressional scrutiny and

review.[4] It is significant to note, however, that this lengthy Congressional debate regarding section 7 has been marked by conspicuous silence over the substantive impacts, if any, of subsection 7(a)(1), and with valid reason. For while subsection 7(a)(1) could be characterized as a general grant of authority to integrate endangered species conservation into other existing federal programs, that subsection did not, as did subsection 7(a)(2), establish any rigid set of priorities among competing, often conflicting, program objectives. That is, while subsection 7(a)(1) added endangered species conservation to the potential list of generic program goals and authorities for a given project, it did not require that such conservation initiatives be factored in first. Subsection 7(a)(1) had a more limited purpose: it resolved once and for all the question as to whether federal agencies had the authority to add endangered species conservation into their planning processes. No longer could agencies argue that they lacked the authority to accomplish that objective. While giving federal agencies this grant of discretionary planning authority, however, Congress did not dictate a particular set of results. It did not mandate that endangered species conservation be accorded the highest priority in all planning efforts.

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[4]See H.R. Conf. Rep. No. 835, 97th Cong., 2d Sess. 25-28 (1982); S. Rep. No. 418, 97th Cong., 2d Sess. 16-22 (1982); H.R. Rep. No. 567, 97th Cong., 2d Sess. 10-11, 13-15, 24-29 (1982); H.R. Conf. Rep. No. 697, 96th Cong., 1st Sess. 12-16 (1979); S. Rep. No. 151, 96th Cong., 1st Sess. 3-4, 4-6 (1979); H.R. Rep. No. 167, 96th Cong., 1st Sess. 5-6 (1979); H.R. Conf. Rep. No. 1804, 95th Cong., 2d Sess. 18-23 (1978); S. Rep. No. 874, 95th Cong., 2d Sess. 2-7 (1978); H.R. Rep. No. 1625, 95th Cong., 2d Sess., 7-13, 14-15, 19-25 (1978).

This difference in approach between subsections 7(a)(1) and 7(a)(2) has a ready explanation. Subsection 7(a)(1) provides federal agencies with the authority to "do good things" for endangered species; *i.e.*, to aid in their recovery through compatible agency programs. Subsection 7(a)(2), on the other hand, focuses on the potential for *conflict* between a given agency program and endangered species conservation. In such conflict situations where the continued existence of a listed species may be at stake, Congress has made the value judgment that endangered species conservation comes first. Any lesser choice could result in extinction, as recognized by the Supreme Court in *Tennessee Valley Authority v. Hill, supra,* 437 U.S. at 184-85.

The district court erred in the *Carson* case, by failing to recognize this difference in focus between subsections 7(a)(1) and 7(a)(2). It inappropriately applied the analysis of the Supreme Court in *Tennessee Valley Authority v. Hill* (a case focusing on the jeopardy standard now found in subsection 7(a)(2)) to a dispute regarding the Secretary's authority to discretionarily operate Stampede Reservoir for the benefit of endangered and threatened species (a subsection 7(a)(1) case). As to whether the Secretary had the discretionary authority under the ESA to integrate endangered species conservation into the operation of Stampede Reservoir, there can be no doubt. Subsection 7(a)(1) clearly provides that authority and the district court's opinion should have stopped with that conclusion. It compounded its error, however, by going further and *mandating* endangered species conservation as the priority project purpose until such time as the cui-ui fish and the Lahontan cutthroat trout are recovered.

This ordering of priorities is not only inconsistent with general Congressional intent for subsection 7(a)(1), it also produces the anomalous result of according greater substantive weight and impact to subsection 7(a)(1) than to subsection 7(a)(2).[5] Heretofore, the jeopardy standard under subsection 7(a)(2) was considered to be the only substantive restriction on agency action under section 7. Moreover, it has always been the position of the Service that a federal agency could still be in compliance with section 7 for a given project that adversely affects a listed species, so long as the anticipated level of takings or impacts were not so high as to result in a finding of jeopardy.[6]

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[5]Although there is no express legislative history directly weighing and comparing the relative strengths of subsection 7(a)(1) with 7(a)(2), there can be no doubt that Congress considered the jeopardy standard of subsection 7(a)(2) as being the substantive cornerstone of section 7:

> The term "is likely to jeopardize" is used because the *fundamental* obligation of section 7(a) of the act is that Federal agencies insure their actions do not jeopardize the continued existence of an endangered or threatened species.

S. Rep. No. 151, *supra* note 4, at 4 (emphasis added).

[6]The current section 7 regulatory definition of jeopardy recognizes that a given project can incidentally take a number of endangered species and still not violate the jeopardy standard. 50 C.F.R. § 402.02. The level of incidental take allowable under subsection 7(a)(2) varies, depending on the relative scarcity of the particular species involved. Congress implicitly ratified this regulatory construction in 1982 by providing in subsections 7(b)(4) and (o) of the Act that incidental takings which occur for a project that received a "no jeopardy" biological opinion, would not constitute a violation of the taking prohibitions of section 9. However, if subsection 7(a)(1)'s affirmative conservation provisions were the true substantive

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If one followed the logic of the *Carson* case, however, one would now have to assume that this long standing administrative interpretation of the Act was wrong. It would no longer be enough to show that a proposed action would not jeopardize the continued existence of a listed species. Henceforth you would have to show that a given project was contributing to the conservation of affected listed species and would continue to do so until the species were recovered. Thus, it would now be unacceptable for a proposed project to be slightly adverse to a listed species or even neutral in its impacts. It would have to affirmatively promote the recovery of affected listed species, even at the expense of overriding other legally-authorized project purposes.

This simply is not what Congress could have intended, for the resultant impacts would be so extreme and devastating to Federal agency programs that Congress would have unquestionably addressed the matter in the 1978, 1979 and 1982 amendments to the Act. What they addressed instead was the need to provide an exemption to the only substantive standard that they perceived to exist in section 7, the jeopardy standard in subsection 7(a)(2). Throughout the exemption process provisions of the Act, it is a conflict with subsection 7(a)(2) and not subsection 7(a)(1) that is a prerequisite to seeking an exemption. *See* 16 U.S.C. § 1536(f), (g)(1) and (3), (h). Yet the

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yardstick upon which federal programs were to be measured, Congressional amendments in subsections 7(b)(4) and (o) would have been pointless, since it is difficult to conceive of a situation where any level of incidental take could satisfy the affirmative conservation standard decreed by the district court in *Carson*. Thus, it is clear that subsection 7(a)(2) contains the only substantive mandate controlling agency action under section 7.

*Carson* ruling puts a gloss on subsection 7(a)(1) that makes it more burdensome than subsection 7(a)(2). Would Congress have spent so must time on subsection 7(a)(2) if subsection 7(a)(1) were even more restrictive? We think that the obvious answer to that question is "no."

*Conclusion*

For the reasons stated above, we conclude that the interpretations placed upon the Secretary's conservation responsibilities in the *Carson* case are in error and beyond the intent of Congress. In addition to overlooking the truly relevant subsections of the ESA, the district court misplaced its reliance upon the *Defenders of Wildlife* and *Connor* cases. Those cases should be viewed as fairly narrow cases under the Administrative Procedure Act and nothing more. Moreover, *Tennessee Valley Authority v. Hill* is of questionable relevance, since that case concerned a violation of the substantive prohibition of section 7 (the jeopardy standard) and did not involve the grant of affirmative conservation authority in subsection 7(a)(1). While a Congressionally-mandated set of priorities was established under subsection 7(a)(2) of the Act, no such ordering of project purposes and priorities was established under subsection 7(a)(1). Federal agencies are now empowered to incorporate endangered species concerns into project planning, but so long as the jeopardy standard of subsection 7(a)(2) is not violated, no *particular* conservation goal or priority is required under subsection 7(a)(1).

In short, the district court in the *Carson* case should have upheld the discretionary authority of the Bureau of Reclamation to allocate Stampede Reservoir waters for endangered species conservation purposes and left it at that.

As a matter of law, no one conservation regime should be considered favored or mandated as opposed to another. The attempt of the district court to mandate a particular program represents an unwarranted limitation of the discretionary conservation authorities granted to federal agencies. A clarification of these matters should thus be sought on appeal.

/s/ Keith E. Eastin